(2)

87-5002

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

STATE OF WISCONSIN, ex rel.
ELLIS T. McCOY,

Appellant,

v.

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

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STATE OF WISCONSIN, ex rel.
ELLIS T. McCOY,

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v.

WISCONSIN COURT OF APPEALS,
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Appellee.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Is Rule 809.32(1), Stats., unconstitutional to the extent that it requires a defendant in a criminal appeal to discuss in a no merit brief why the issue that might arguably support the appeal lacks merit?

PARTIES BELOW

The parties in the Supreme Court of Wisconsin were petitioner State of Wisconsin ex rel. Ellis T. McCoy, by Louis B. Butler, Jr., Assistant State Public Defender, Relator Ellis T. McCoy and the Wisconsin Court of Appeals, District I.

OPINIONS BELOW

The April 9, 1987, decision of the Wisconsin Supreme Court is reported as State of Wisconsin ex rel. Ellis T.

McCoy v. Wisconsin Court of Appeals, District I, 137 Wis. 2d 99, 403 N.W.2d 449 (1987). The text of the opinion is set out verbatim in Appendix A: 1-15, and the dissent is set forth at Appendix A: 15-19.

JURISDICTION

(i) Nature of the proceeding.

This is an appeal from an original action for declaratory judgment in the Wisconsin Supreme Court. The Wisconsin Court was called upon to consider the constitutionality of Rule 809.32(1), Stats. (1983-1984), which requires that appointed counsel, upon determining that a criminal appeal would be frivolous, submit a brief to the court of appeals which includes an explanation as to why any issues which might arguably support an appeal lack merit. Appellant alleged that the discussion requirement of why an appeal lacked merit violated relators rights to appeal, to due process on appeal, and to effective assistance of counsel on appeal. The Wisconsin Supreme Court, in a four to three decision, upheld the constitutionality of the discussion requirement of Rule 809.32(1), Stats.

(ii) Judgments below.

This was an original action for declaratory judgment accepted by the Wisconsin Supreme Court on March 27, 1986 (Appendix B). It arises, however, out of the related case of State of Wisconsin v. Ellis T. McCoy, Case No. 84-929-CR-NM. Mr. McCoy was convicted in Milwaukee County Circuit Court on December 2, 1983, of one count of second degree sexual assault, contrary to sec. 940.225(2)(a), and one count of abduction, contrary to sec. 940.32(1), Stats., the Honorable William A. Jennaro, presiding (Appendix C: 1). The decision

of the Wisconsin Supreme Court in this action was entered April 9, 1987.

(iii) Jurisdiction in this Court

Section 1257(2), Title 28, United States Code vests jurisdiction in this Court because the final judgment below upheld the validity of state statute and its application against claims that it is repugnant to the Constitution of the United States.

Cases which support jurisdiction over this appeal include Lathrop v. Donohue, 367 U.S. 820, 824 (1961); Reinman v. Little Rock, 237 U.S. 171, 176 (1915); Williams v. Bruffy, 96 U.S. 176, 183 (1878); King Manufacturing Co. v. Augusta, 277 U.S. 100, 107-112 (1928); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731 (1980); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 485-86 (1983); Mosing v. Hagen, 33 Wis. 2d 636, 646-47, 148 N.W.2d 93 (1967); and In the Matter of E.B., 111 Wis. 2d 175, 181, 220 N.W.2d 584 (1983).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENTS TO THE UNITED STATES CONSTITUTION

ARTICLE VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WISCONSIN CONSTITUTION

ARTICLE I

Rights of Accused. SECTION 7. In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

Prosecutions; double jeopary; self-incrimination; bail; habeas corpus. SECTION 8. [As amended Nov. 1870 and April 1981] **(1)** No person may be held to answer for a criminal offense without due process of law, and no person for the same offense may be put twice in jeopardy of punishment, nor may be compelled in any criminal case to be a witness against himself or herself.

Rights of suitors. SECTION 21. [As amended April 1977] **(1)** Writs of error shall never be prohibited, and shall be issued by such courts as the legislature designates by law.

(2) In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice. [1975 J.R. 13, 1977 J.R. 7, vote April 1977]

STATUTES AND COURT RULES INVOLVED

808.03 (1983-84) Appeals to the court of appeals. **(1)** APPEALS AS OF RIGHT. A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order entered in accordance with s. 806.06(1)(b) or 807.11(2) or a disposition recorded in docket entries in traffic regulation cases and municipal ordinance violation cases prosecuted in circuit court which disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.

....

809.30 (1983-84) Rule (Appeals in felony cases). **(1)** APPEAL OR POSTCONVICTION MOTION BY DEFENDANT. (a) An appeal or motion for postconviction relief by a defendant in a felony case must be taken in accordance with this subsection.

(b) The trial judge shall inform the defendant at the time of sentencing or imposition of a fine or probation of the right to appeal or seek other postconviction relief, the time limits on seeking the relief and, if indigent, the right to publicly compensated counsel in those proceedings.

(c) If the defendant claims or appears to be indigent and wishes to have publicly compensated counsel to represent the defendant in seeking postconviction relief, the defendant shall notify the state public defender within 45 days of the date of sentencing or imposition of fine or probation. The state public defender shall within 60 days of notification by the defendant determine the defendant's indigency and appoint counsel as provided in ch. 977, and at the same time shall request the court reporter to prepare the transcript of notes of the proceedings in the case.

....

809.32 (1983-84) Rule (No merit reports) (1) If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. Calfornia, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service.

(2) The attorney shall file in the trial court a notice of appeal of the judgment of conviction and of any order denying a postconviction motion. The clerk of the trial court shall transmit the record in the case to the court pursuant to s. 809.15. The no merit brief and notice of appeal must be filed within 180 days of the service upon the defendant of the transcript under s. 809.30(1)(e).

(3) In the event the court of appeals finds that further appellate proceedings would be frivolous and without any arguable merit, the court of appeals shall affirm the judgment of conviction and the denial of any postconviction motion and relieve the attorney of further responsibility in the case. The attorney shall advise the defendant of the right to file a petition for review to the supreme court under s. 809.62.

(4) If a fully briefed appeal is taken to the court of appeals and the attorney is of the

opinion that a petition for review in the supreme court under s. 809.62 would be frivolous and without any arguable merit, the attorney shall advise the defendant of the reasons for this opinion and that the defendant has the right to file a petition for review. If requested by the defendant, the attorney shall file a petition satisfying the requirements of s. 809.62(2)(d) and (f) and the defendant shall file a supplemental petition satisfying the requirements of s. 809.62(2)(a), (b), (c) and (e). The petition and supplemental petition shall both be filed within 30 days of the day of the decision of the court of appeals. An opposing party may file a response to the petition and supplemental petition within 10 days of the service of the supplemental petition.

967.06 (1983-84) Determination of Indigency; appointment of counsel; preparation of record. As soon as practicable after a person has been detained or arrested in connection with any offense which is punishable by incarceration, or in connection with any civil commitment proceeding, or in any other situation in which a person is entitled to counsel regardless of ability to pay under the constitution or laws of the United States or this state, the person shall be informed of his or her right to counsel. Persons who indicate at any time that they wish to be represented by a lawyer, and who claim that they are not able to pay in full for a lawyer's services, shall immediately be permitted to contact the authority for indigency determinations specified unders. 977.07(1). The authority for indigency determination in each county shall have daily telephone access to the county jail in order to identify all persons who are being held in jail. The jail personnel shall provide by phone information requested by the authority. In any case in which the state public defender provides representation to an indigent person, the public defender may request that the applicable court reporter or clerk of courts prepare and transmit any transcript or court record. The request shall be complied with. The county treasurer shall compensate the court reporter or clerk of courts for the preparation and transmittal of the documents, upon the written statement of the state public defender that the documents were required in order to provide representation to the indigent person.

STATEMENT OF THE CASE

This was an original action before the Wisconsin Supreme Court. It arises, however, out of the case State v. Ellis T. McCoy, No. 84-929-CR-NM. Mr. McCoy was convicted in Milwaukee County Circuit Court on December 2, 1983, of one

count of second degree sexual assault, contrary to sec. 940.225(2)(a), and one count of abduction, contrary to sec. 940.32(1), Stats., the Honorable William A. Jennaro presiding. Upon conviction, he was sentenced to six years, each count, to be served consecutively at the Dodge Correctional Institution at Waupun, Wisconsin.

The petitioner in the Wisconsin Supreme Court represents the relator, Ellis T. McCoy, in the case of State v. McCoy, No. 84-929-CR-NM, now pending in the Wisconsin Court of Appeals, District I. After doing research in preparation for filing the brief in that action, petitioner concluded that further appellate proceedings on behalf of Mr. McCoy would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967) and Rule 809.32(1). App. D: 1-2. Petitioner discussed the matter by telephone twice with Mr. McCoy, who was advised that his options included voluntarily dismissing the appeal, proceeding pro se or requiring the petitioner to file a no merit report. App. D: 2. Mr. McCoy opted for a no merit report. App. D: 2.

A motion was filed on behalf of Mr. McCoy before the court of appeals on August 14, 1984, to determine the constitutionality of Rule 809.32(1) and clarify the scope of petitioner's representation on appeal. App. D. The motion alleged that that portion of Rule 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on McCoy's Sixth Amendment right to counsel. App. D: 3-4.

The Wisconsin Court of Appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of

counsel. Consequently, no justiciable controversy exists involving the constitutionality issue." App. E: 1-2.

Petitioner filed a "no merit" brief on October 22, 1984, which was in compliance with Anders and the subsequent decision of Evitts v. Lucey, 469 U.S. 387, 394 (1985), but not in compliance with Rule 809.32(1). App. F. In an introduction to that brief, petitioner pointed out that the rule and Anders could not be reconciled, and that he was ethically obligated to protect his client's Sixth Amendment right to counsel on appeal pursuant to SCR 20.34(1)(c) and (2)(a) (1984). App. F: 4-7.

The court of appeals, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included. App. G. The court also ordered that petitioner file a new brief within fifteen (15) days of the date of that order which was in compliance with the Rule. App. G: 2.

Petitioner filed a petition for a supervisory writ of prohibition and declaration of relator's rights in the Wisconsin Supreme Court dated April 23, 1985. App. H: 1-7 [app. omitted]. The court, however, in an order dated May 8, 1985, ruled that petitioner was not entitled to a supervisory writ and declaratory relief from that court for the reason "that he has an adequate remedy in the court of appeals by renewing his motion for a determination of constitutionality of sec. (Rule) 809.32(1), Stats." App. I: 1-2.

Petitioner renewed his "Motion to Determine Constitutionality of Rule 809.32(1) and to Clarify Scope of Attorney's Representation on Appeal" in the court of appeals in a motion dated June 4, 1985. App. J: 1-7 [App. omitted]. The court of appeals once again denied petitioner's motion in

an order amended January 16, 1986, stating that the "constitutionality of sec. 809.32(1), Stats., must be determined by its supreme court authors and not by a court bound to obey what the court creates." App. K: 1-3. The court again directed petitioner to file a brief in compliance with Rule 809.32(2) within fifteen (15) days of the date of the order. App. K: 3.

Petitioner renewed his "Petition for Supervisory Writ of Prohibition and Declaration or Relator's Rights" in the Wisconsin Supreme Court on January 24, 1986. App. L: 1-8. The court granted the petition, insofar as it sought a declaratory judgment with respect to the constitutionality of Rule 809.32(1) in an order dated March 27, 1986. App. B: 1-2. The court also held the petition for a supervisory writ of prohibition in abeyance pending further order of the court. App. B: 2.

The Wisconsin Supreme Court, in a decision entered April 9, 1987, upheld the constitutionality of Rule 809.32(1). McCoy, *supra*; App. A. The court admitted that the Wisconsin no merit procedure goes beyond Anders and requires an attorney to file brief which includes a statement indicating why the appeal lacks merit. 137 Wis. 2d at 95; App. A: 6. The court, however, stated that "(w)hile Anders does not sanction the use of the discussion requirement, it does not proscribe it, either." 137 Wis. 2d at 97; App. A: 8. The court stated that "... we believe the rule requires an attorney to fulfill a duty that co-exists with the duty owed to the client -- that duty which is owed to the court. The court will be better equipped to make the correct decision about the potential merits of the appeal if it has before it not only the authorities which might favor an appeal, but also the authorities which might militate against it." 137 Wis.

2d at 100-101; App. A: 11-12. The court added, "… the discussion requirement serves as a significant administrative aid to the reviewing court.… Hence, the discussion requirement operates as a judicial aid, serves an informational function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner." 137 Wis. 2d at 103; App. A: 14.

Three of the seven justices dissented on the ground that the no merit rule violates the defendant's Sixth Amendment right to effective assistance of counsel. 137 Wis. 2d at 104; App. A: 15. The dissent noted that "(c)ounsel's filing a brief setting forth arguments against the defendant's position is a task that benefits the court but not the client. Accordingly, such a task is more properly assigned to an *amicus curiae* than the advocate." 137 Wis. 2d at 106-107; App. A: 17-18).

THE QUESTION IS SUBSTANTIAL

This Court previously examined the role of appointed appellate counsel in Anders v. California, 386 U.S. 738 (1967). The Court in Anders ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client, as opposed to that of *amicus curiae*. 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed

to raise any points he chooses, "the court -- not counsel -- then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a non-indigent defendant is able to obtain.

Id. at 745.

The Wisconsin Supreme Court in the instant case recognizes that the procedure in Wisconsin under Rule 809.32(1) "… goes beyond Anders and requires that the attorney file a brief which … includes a statement indicating why the appeal lacks merit." 137 Wis. 2d at 95; App. A: 6. The substantial question presented is whether the Wisconsin rule deprives a criminal defendant of his rights to appeal,[1] to due process on appeal,[2] and to effective assistance of counsel on appeal,[3] contrary to the Sixth and Fourteenth Amendments to the United States Constitution.

One circuit of the United States Court of Appeals, in a decision published April 13, 1987, recently ruled that a criminal defendant was denied effective assistance of counsel when his apellate lawyer did exactly what the Wisconsin Supreme Court requires McCoy's appellate counsel to do. Robinson v. Black, 812 F.2d 1084 (8th Cir. 1987). The court concluded that "counsel did not act as an advocate when he

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1 Wisconsin law provides for an appeal as of right. Sec. 808.03 and Rule 809.30(1)(b); Art. I, sec. 21, Wis. Const.

2 Art. I, sec. 8, Wis. Const.

3 Art. I, sec. 7, Wis. Const.; Rule 809.30(1)(b) and sec. 967.06.

briefed all issues in favor of the government and concluded Robinson's claims were meritless. Robinson had a right to expect counsel to brief and argue his case to the best of counsel's ability showing the most favorable side of defendant's arguments. Counsel changed the adversarial process into an inquisitorial one by joining forces of the state and working against the client." *Id.*, at pp. 1086-87.

On the other hand, another circuit of the United States Court of Appeals came to the opposite conclusion and has held that a brief include a statement indicating why arguments ostensibly supporting an appeal are without merit. United States v. Edwards, 777 F.2d 364, 365-66 (7th Cir. 1985).

A number of state courts have interpreted Anders in a wide variety of ways, with some adopting alternative mechanisms for dealing with the difficult ethical dilemma at the heart of the case, either under their state constitutions or supervisory powers. *See, e.g.*, State v. Horine, 64 Or. App. 532, 669 P.2d 797 (Ct. App. 1983); State v. McKenney, 98 Idaho 551, 568 P.2d 1213 (1977); People v. Wende, 25 Cal.3d 436, 158 Cal. Rptr. 389, 600 P.2d 1071 (1979); Turner v. Haynes, 245 S.E.2d 629 (W.Va. 1978); State v. Varner, 692 P.2d 753 (Utah 1984); State v. Shattuck, 684 P.2d 154 (Ariz. 1984); State v. Duncan, 385 N.E.2d 323, 57 Ohio App.2d 93, 11 O.O. 3d 83 (Ohio App. 1978); State v. Allen, 99 N.J. Super. 314, 239 A.2d 675 (1968); Huguley v. State, 253 Ga. 709, 324 S.E.2d 729 (1985); State v. Gates, 466 S.W.2d 681 (Mo. 1971); State v. Lewis, 291 N.W.2d 735 (N.D. 1980); Ex parte Sturdivant, 460 So.2d 1210 (Ala. 1984), *on remand*, 460 So.2d 1213 (Ala. 1984); Commonwealth v. Moffett, 418 A.2d 585 (Mass. 1981); Eaton v. State, 660 P.2d 803 (Wyo. 1983); State v. Henderson, 425 S.W.2d 593 (Tenn. 1968); Smith v. State, 248 A.2d 146 (Del. 1968); Killingsworth v. State, 490 So.2d

849 (Miss 1986); Smith v. State, 496 So.2d 971 (Fla. App. 1986); Caraway v. Texas, 560 S.W.2d 690 (Tex. Crim. 1978); People v. Lowery, 86 A.D.2d 537, 445 N.Y.S.2d 992 (1982); Commonwealth v. McClendon, 495 Pa. 467, 434 A.2d 1185 (1981) and Dixon v. State, 152 Ind. App. 430, 284 N.E.2d 102 (1972). A review of these decisions clearly establishes that the judicial systems across the country have not been able to interpret Anders and evolve a uniform approach to appellate counsel's dilemma as to how to protect the client's appeal when counsel de ermines that the case lacks merit.

In addition, commentators have not only criticized Anders for creating a procedure that is impossible to follow, but have also pointed out that decisions purporting to interpret Anders are often inconsistent with Anders. *See, e.g.*, Pengilly, Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal, 9 Crim Jus. J. 45 (1986); and Hermann, Frivolous Criminal Appeals, 47 N.Y.U.L. Rev. 701 (1972). For example, Pengilly correctly points out that a decision which was heavily relied upon by the Wisconsin Supreme Court in the instant case, Nickols v. Gagnon, 454 F.2d 467 (7th Cir. 1971), is "... irreconcilable with the requirements of Anders" on at least two different points. 9 Crim. Just. J. at pp. 55-56. Indeed, Pengilly states that while the "Wisconsin" approach followed in Cleghorn v. State, 55 Wis. 2d 466, 198 N.W.2d 577 (1972) may uphold the Model Code of Professional Responsibility, it violated the strict mandate of Anders. *Id.*, at p. 55. And another commentator has stated that virtually the same brief is required whether assigned counsel supports the appeal or requests withdrawal. Mendelson, Frivolous Criminal Appeals: The Anders Brief or The Idaho Rule? 19 Crim. Law Bull. 22, 26-27 (1983). This view was

not shared by the Wisconsin Supreme Court in the instant case.

In light of the conflict between the Seventh and Eighth Circuits of the United States Court of Appeals, the difficulty with and lack of a uniform interpretation of Anders among the various states throughout the country, and the lack of agreement within the Wisconsin Supreme Court, appellant submits that the question presented is substantial and review is warranted. Appellant would also submit that appellate counsel should not disregard one of the binding but irreconcilable decisions without a clear indication that the McCoy procedure is acceptable under Anders. This Court should determine whether the Constitution allows appointed appellate counsel to provide reasons why a case lacks merit when no such indication exists in Anders.

CONCLUSION

In light of the foregoing, appellant respectfully requests that this Court note probable jurisdiction of this appeal and set this case for briefing and oral argument.

Respectfully submitted,

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Dated May 20, 1987.

A P P E N D I X

STATE of Wisconsin EX REL. Ellis T. McCOY, Petitioner,

v.

WISCONSIN COURT OF APPEALS, DISTRICT 1, Respondent.

Supreme Court

No. 86-0172-W. Argued January 5, 1987.—Decided April 9, 1987.

Criminal Law and Procedure § 699.5*—appellate briefs—meritless appeals discussion rule—constitutionality.

Statute requiring that appointed counsel, upon determining that criminal appeal would be frivolous, submit brief to court of appeals which includes explanations as to why issues which might arguably support appeal lack merit, is not unconstitutional, since rule does not require attorney to engage in protracted argument in favor of that conclusion, but merely indicates to court that appointed counsel has given full consideration to relative merits of appeal and thus does not deny accused effective assistance of counsel (Stats § 809.32(1)).

ABRAHAMSON, J., HEFFERNAN, C.J. and BABLITCH, J., dissent.

PETITION for declaration of rights. *Rights declared.*

For the petitioner there were briefs and oral argument by *Louis B. Butler, Jr.,* assistant state public defender.

* See Callaghan's Wisconsin Digest, same topic and section number.

APPENDIX A

For the respondent the cause was argued by *James H. McDermott,* assistant attorney general, with whom on the brief was *Bronson C. La Follette,* attorney general.

LOUIS J. CECI, J. In this original action for a declaratory judgment, we are called upon to consider the constitutionality of sec. (Rule) 809.32(1), Stats. (1983–84),[1] which requires that appointed counsel, upon determining that a criminal appeal would be frivolous, submit a brief to the court of appeals which includes an explanation as to why any issues which might arguably support an appeal lack merit. Petitioner Louis B. Butler, the public defender in this case who was assigned to handle the appeal of defendant Ellis T. McCoy's criminal conviction, asserts that the defendant's constitutionally protected right to counsel, guaranteed by the sixth amendment to the United States Constitution and by art. I, sec. 7 of the Wisconsin Constitution, is violated by the so-called "no-merit brief" requirement. We disagree and now uphold the constitutionality of the rule contained in sec. 809.32(1).

The facts in this case are not in dispute. The defendant was convicted in Milwaukee county circuit

[1] Section 809.32(1) provides that, "If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service."

court on December 2, 1983, of one count of second-degree sexual assault, sec. 940.225(2)(a), Stats., and of one count of abduction, sec. 940.32(1).[2] In preparing for the appeal, petitioner concluded that further appellate proceedings were not warranted and that any issues which could be advanced in support of an appeal were without arguable merit under *Anders v. California,* 386 U.S. 738 (1967), and under sec. 809.32(1). Defendant was then advised of his available options, which included (1) voluntarily dismissing the appeal, (2) proceeding with the appeal *pro se,* or (3) submitting a no-merit brief, pursuant to sec. 809.32(1), to the appeals court. Defendant chose the no-merit brief option.

Prior to filing a no-merit brief, however, petitioner filed a motion in the appeals court, seeking to determine the constitutionality of sec. 809.32(1) and to clarify the scope of representation on appeal. The motion was denied on September 7, 1984, on standing grounds, with the appeals court stating that since the no-merit brief had not yet been filed, no justiciable controversy existed.

Petitioner filed a no-merit brief on October 22, 1984. The appeals court, on April 16, 1985, ordered that this brief be struck for noncompliance with sec. 809.32(1) and that a new brief be filed. Petitioner's brief complied with the requirements set forth in sec. 809.32(1), except that it did not contain a statement of reasons why the issues which might arguably support an appeal lacked merit.

Counsel petitioned this court on April 24, 1985, for a supervisory writ of prohibition and declaration of relator's rights, seeking to resolve the constitutional

[2]*State v. Ellis T. McCoy,* No. 84-929-CR-NM.

issue. On May 8, 1985, this court denied the petition, on the grounds that petitioner had an adequate remedy at law in the court of appeals. Petitioner renewed his motion in the court of appeals to determine the constitutionality of sec. 809.32(1), and the court again denied the motion, stating that any determination of the constitutionality of the no-merit rule should be made by this court. Thereafter, defense counsel renewed his petition to this court, which was granted on March 27, 1986.

Petitioner asserts that defendant's constitutionally guaranteed right to counsel, which includes the right to effective assistance of counsel, *State v. Ludwig,* 124 Wis. 2d 600, 606, 369 N.W.2d 722 (1985); *Strickland v. Washington,* 466 U.S. 668, 686 (1984), is violated by the no-merit requirement contained in sec. 809.32(1). Petitioner cites the decision of the United States Supreme Court in *Anders,* which is explicitly referred to in Wisconsin's no-merit rule, as the primary source of support for this conclusion. We agree that *Anders* should be the touchstone of our analysis, although we do not believe that it compels a finding of unconstitutionality. We therefore begin our discussion of an attorney's responsibilities to a criminal client upon appeal with an analysis of *Anders.*

In *Anders,* defense counsel, after consulting with his client and studying the trial record, determined that further appellate proceedings on behalf of his indigent client would be meritless. He so notified the appeals court by letter[3] and requested to withdraw as

[3]Counsel's letter stated, "'I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained

counsel for the defendant. The Court in *Anders* did not believe that counsel's letter, articulating only a "bare conclusion" regarding the merits of defendant's appeal, satisfied constitutional requirements. 386 U.S. at 742.

The procedure followed by defense counsel in *Anders,* the high Court held, was constitutionally defective because it "did not furnish petitioner with counsel acting in the role of advocate," *id.* at 743, and "[t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae.* The no-merit letter and the procedure it triggers do not reach that dignity." *Id.* at 744. The Court then explained what counsel's proper role on appeal should be:

> "[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires.

my views and opinions to him . . . [H]e wishes to file a brief in this matter on his own behalf.'" 386 U.S. at 742.

> On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Id.*
>
> "The utility of this procedure is that appointed counsel would not be force[d] . . . to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the client nor the court any aid. The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate. Moreover, such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. This procedure will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." *Id.* at 745.

The Wisconsin procedure goes beyond *Anders* and requires that the attorney file a brief which, in addition to articulating anything in the record which might support an appeal, includes a statement indicating why the appeal lacks merit. It is this latter requirement to which the petitioner objects and on which we now focus.

Petitioner contends that the discussion requirement is directly contrary to the court's admonition in

Anders that counsel on appeal is not to act as *amicus curiae,* but rather is obligated to act as advocate to the best of his or her ability. For support, petitioner additionally cites *Evitts v. Lucey,* 469 U.S. 387 (1985), which states that, citing *Anders,* appellate counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Id.* at 394. He asserts that when counsel is required to discuss the reasons why an appeal lacks merit, he or she is in effect abdicating the advocate's role and is instead arguing against the client. This, petitioner argues, is proscribed by *Anders.*

In addition, petitioner argues that a simple definitional approach compels a finding that if counsel is required to comply with the no-merit rule, he or she is no longer "advocating" appellant's cause.[4] When counsel files a no-merit brief which complies with the discussion requirement, petitioner argues, he or she is merely acting as *amicus curiae,* advancing a rationale which is more consistent with the views of the court than with the views and interests of defendant, counsel's client.[5]

[4]According to petitioner, an advocate "is one who supports, defends or pleads another's cause."

[5]Petitioner offers two definitions of *amicus curiae,* citing *Black's Law Dictionary* 75 (5th ed. 1979), which states that *amicus curiae* "means, literally, friend of the court. A person with strong interest in or views on the subject matter of an action may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views." Also cited is *Webster's New World Dictionary* 44 (2d ed. 1972), defining *amicus curiae* as "a person who offers, or is called in, to advise a court on some legal matter."

Petitioner then surveys cases from other jurisdictions which ostensibly support his position that appellate counsel must not deviate from the advocate's role and that the Wisconsin procedure is at odds with that principle. These cases, petitioner argues, demonstrate that counsel is not to play any part in determining the merits of the appeal. *See, e.g., State v. Allen,* 99 N.J. Super. 314, 322, 239 A.2d 675, 679 (1968), stating that "[o]nce a defendant exercises his right to appeal, his appellate counsel must be an advocate and he does not decide whether the claim will be successful as argued by the State. ... That task is for the courts."

We do not mean to disparage the importance of counsel's role as advocate. We are sensitive to the rights of a criminal defendant, especially an indigent defendant, to effective representation. We have previously recognized, in a case decided prior to the enactment of the no-merit rule, that the *Anders* analysis compels appointed counsel to "perform his duties as adequately as paid counsel so the indigent will not be deprived of adequate representation because of his indigency." *Cleghorn v. State,* 55 Wis. 2d 466, 471, 198 N.W.2d 577 (1972). We reaffirm our belief in that principle. However, we are nevertheless compelled to reject petitioner's proffered analysis.

We now uphold the constitutionality of the no-merit brief rule. While *Anders* does not sanction the use of the discussion requirement, it does not proscribe it, either. Our interpretation of *Anders* is consistent with cases which have validated the discussion requirement and which have construed that requirement to harmonize with, rather than diverge from, the *Anders* holding. *See, United States v. Edwards,* 777 F.2d 364 (7th Cir. 1985); *Nickols v. Gagnon,* 454 F.2d 467 (7th Cir. 1971). The court in *Edwards*

explicitly reaffirmed the attorney's obligation to file a brief which includes a statement indicating why arguments ostensibly supporting an appeal are without merit. 777 F.2d at 365–66. Similarly, in *Nickols,* the seventh circuit examined the adequacy of a letter, which included a discussion of "matter[s] demonstrating the absence of merit [of issues arguably supporting an appeal]," submitted by the defense attorney who was seeking to withdraw as counsel. 454 F.2d at 469. In deciding that the letter was adequate, the court contrasted counsel's letter which "included a reasoned exposition of the basis for his conclusion," *id.,* with the short letter submitted by counsel in *Anders,* which contained only a "conclusory statement" of the frivolity of the appeal. *Id.,* n. 4. Thus, the court in *Nickols* also contemplated, consistent with sec. 809.32(1), Stats., the discussion requirement and, further, did not believe that *Anders* in any way prohibited it. Likewise, we do not believe that *Anders* in any way prohibits it. Petitioner's reliance on *Evitts* is also misplaced, because it does not prohibit the discussion requirement, either.

Petitioner argues that when an attorney submits a statement which includes a discussion of why his or her client's appeal lacks merit, that attorney is, in effect, like the judge, "deciding" the merits of the appeal. This, petitioner argues, is impermissible because "[i]t is not counsel's prerogative to determine finally the merits of an appeal, but, as directed in *Anders,* 'the court—not counsel ... decide[s] whether the case is wholly frivolous.'" *Turner v. Haynes,* 162 W. Va. 33, —, 245 S.E.2d 629, 631 (1978). *See also, Rhodes v. Leverette,* 160 W. Va. 781, 239 S.E.2d 136 (1977); *People v. Feggans,* 67 Cal. 2d 444, 432 P.2d 21, 62 Cal. Rptr. 419 (1967); *State v. Varner,* 692 P.2d 753

(Utah 1984); *State v. Shattuck,* 140 Ariz. 582, 684 P.2d 154 (1984); *State v. Duncan,* 57 Ohio App. 2d 93, 385 N.E.2d 323 (1978).

We similarly believe that it is ultimately the court's, and not counsel's, prerogative to judge the relative merits of an appeal; nevertheless, we do not believe that the case authority cited by petitioner compels a finding that the discussion rule is unconstitutional. For example, counsel in *Turner* concluded that his client's appeal prospects would be without merit and so informed his client. Counsel, however, did not provide his client with a copy of the trial transcript, and an appeal was never pursued. In addressing defendant's claim that counsel's actions deprived him of his right to appeal, the court held that, applying *Anders,* counsel did not fulfill his obligation to his client. The court reasoned that counsel—not the court—ultimately decided that the appeal was without merit. 162 W. Va. at —, 245 S.E.2d at 631. It is evident that the court in *Turner* was never even given the opportunity to decide whether it agreed with counsel's conclusion of lack of merit. This was the constitutional infirmity.

For a similar holding, *see, Allen,* 99 N.J. Super. 314, 239 A.2d 675, where the court also found that defendant was deprived of his right to effective assistance of counsel. The defendant was not informed by his attorney that he had the right to appeal or that he had the right to counsel to prosecute an appeal. Again, the court there was never given the opportunity to decide whether counsel's conclusion that the appeal was meritless was adequately supported by case law, the record, or the applicable statutes.

To the contrary, when a court in Wisconsin is presented with counsel's conclusion that an appeal

would be meritless and in addition has before it a summary of the case or statutory authorities which might compel that conclusion, it, and not counsel, decides whether the discussion of why the appeal lacks merit should be accepted. If the Wisconsin rule merely permitted counsel to summarily conclude that the appeal was meritless, without including even a perfunctory discussion of the applicable facts or case authorities in support of that conclusion, *see, e.g., Feggans,* 67 Cal. 2d at 448, 432 P.2d at 23–24, 62 Cal. Rptr. at —, the same concerns raised in *Anders* regarding the constitutional insufficiency of a mere conclusory statement of no merit might arguably apply. That, however, is not the situation here.

We interpret the discussion rule to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with "notice" that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit. Thus, we do not believe the rule requires an attorney to argue against the client; rather, we believe the rule requires an attorney to fulfill a duty that co-exists with the duty owed to the client—that duty which is owed to the court. The court will be better equipped to make the correct decision about the potential merits of the appeal if it has before it not only the authorities which might favor an appeal, but also the authorities which

might militate against it. The court, as *Anders* mandates, is still the final arbiter, and it alone has the responsibility to determine whether the appeal is, in fact, frivolous. Our decision does not deviate from that principle.

We believe that the Wisconsin procedure serves several useful functions. In addition to providing the court with assistance in its review of the record, it assures the court that counsel has "discharged his obligation to his client in a competent and professional manner." *Nickols,* 454 F.2d at 470. That is, the Wisconsin procedure assures the reviewing court that an indigent defendant is receiving exactly that type and level of assistance that a paying client would be receiving under similar circumstances. When the court has before it a reasoned summary of the law militating against further apellate proceedings, it can be assured that the attorney has made an inquiry into the relative merits of the appeal and that the attorney's withdrawal request is valid and grounded in fact and in the law.

The Wisconsin procedure, once again, can be contrasted to that followed in *Anders,* where the attorney simply stated that an appeal would be frivolous and so informed the court in conclusory fashion. It was this conclusoriness that the court found constitutionally offensive in *Anders,* 386 U.S. at 742, because it was indicative of or at least implied a lack of diligence and preparation by the attorney such that it was evident that the criminal defendant was not obtaining the same type and quality of representation that he or she was likely to obtain from private counsel. Since the Wisconsin procedure avoids the type of conclusoriness that *Anders* found offensive, the same concerns raised in *Anders* regarding the quality

and equality of attorney representation are simply not as relevant here.

There is case support in other jurisdictions for the conclusion we have reached. *See, Caraway v. Texas,* 560 S.W.2d 690, 691 (Tex. Crim. 1978); *People v. Lowery,* 86 A.D.2d 537, 538, 445 N.Y.S.2d 992, 993 (1982), stating that "[a] mere mechanical statement that there are no valid issues that could legitimately be raised on an appeal is insufficient"; *Smith v. State,* 496 So. 2d 971, 974 (Fla. Dist. Ct. App. 1986); *Commonwealth v. McClendon,* 495 Pa. 467, 473, 434 A.2d 1185, 1188 (1981).

We reiterate that an indigent criminal defendant, while undisputedly entitled to receive the same level of representation that a paying defendant would receive, is not entitled to receive more than a paying client would receive. *See,* e.g., *Nickols,* 454 F.2d at 472–73. "When [the] attorney has reviewed the law and the record as an advocate and determines that there are no non-frivolous issues to be raised on appeal, the appellant has received what is constitutionally required." *State v. Horine,* 64 Or. App. 532, 548, 669 P.2d 797, 806 (1983).[6]

[6]Although involving a slightly different fact situation, *McClendon* is particularly instructive since it included a detailed statement regarding the "discussion of lack of merit" requirement. It stated that, "Once we are satisfied with the accuracy of counsel's assessment of the appeal as being wholly frivolous, counsel has fully discharged his responsibility. The role of an advocate, insisted upon in *Anders,* refers to the manner in which the record was examined in an effort to uncover grounds to support the appeal. Where counsel has in good faith satisfied that obligation and found the appeal to be wholly frivolous, he can do no more. We reject the view that his explanation of why there is no basis for an appeal should be interpreted as reflecting counsel's

A final consideration which we believe is important to our decision is one which has been alluded to already, namely, the discussion requirement serves as a significant administrative aid to the reviewing court. It first provides a basis for the reviewing court to judge whether an appeal is meritorious. The brief in support of appeal, combined with the "no-merit" discussion, gives the court far more than just a "cold record" to look at; rather, the court has before it both the arguments in support of an appeal and a statement which at least refers to case authorities or factual references which do not support an appeal. Thus, the court has a substantial base of authority to refer to in making its own, independent evaluation of the case. This makes it less likely that the court will overlook important legal authorities which would either support or militate against continued appellate proceedings. Hence, the discussion requirement operates as a judicial aid, serves an informational function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner. With an increase in the number of criminal appeals, this concern should be obvious.

Because we find that adherence to sec. 809.32(1), Stats., does not operate to deprive defendant of any of his constitutional rights, and given the other significant considerations we have enumerated, we affirm the constitutionality of the Wisconsin procedure. Therefore, the petition for a supervisory writ of prohibition is denied.

lack of concern in the client's cause. Nor can that fact be assigned as a reason for concluding that the client did not receive this constitutionally protected right of representation.' 495 Pa. at 473–74, 434 A.2d at 1188.

By the Court.—Rights declared.

SHIRLEY S. ABRAHAMSON, J. *(dissenting).* Our court rule requiring an appointed appellate defense lawyer in a criminal case to explain in a no-merit report the weaknesses in the client's appeal contravenes the *Anders* decision of the United States Supreme Court, complicates the already complex ethical dilemma faced by an appointed defense lawyer who decides that an appeal of the client's case would be frivolous, and is unnecessary to achieve the purposes which the majority believes justify the imposition of the requirement. Because I believe that our rule violates the defendant's sixth amendment right to effective assistance of counsel, and because I believe this court should respond by commissioning a study of a court rule when, as in this case, a challenge to a court rule reveals flaws in the rule, I dissent.

In *Anders v. California,* 386 U.S. 738 (1967), the United States Supreme Court undertook the difficult task of reconciling the professional and personal integrity of appointed appellate defense counsel with the constitutional right of criminal defendants to the assistance of counsel. ABA Standards Relating to the Defense Function, sec. 4–8.3, Commentary (2d ed. 1980). The Court achieved this reconciliation by providing that counsel convinced of the frivolousness of a client's appeal may request to withdraw from the case by following certain procedures, including filing a brief with the court that identifies "anything in the record that might arguably support the appeal." *Anders* appears to rest on the distinction between complete frivolity and absence of merit, the former justifying withdrawal, the latter not justifying withdrawal. *But see Cleghorn v. State,* 55 Wis. 2d 466, 475,

198 N.W.2d 577 (1972). *Anders* has been criticized as forcing appointed appellate defense attorneys to "brief the unbriefable," because a defense attorney who could find something in the record arguably supporting an appeal would not request to withdraw in the first place. ABA Standards Relating to the Defense Function, sec. 4–8.3, Commentary.

The *Anders* decision has drawn more than its share of criticism from courts, commentators and practitioners. Courts have interpreted *Anders* in a wide variety of ways and have adopted alternate mechanisms for dealing with the difficult dilemma at the heart of the case. *See, e.g., State v. Horine,* 64 Or. App. 532, 669 P.2d 797 (Ct. App. 1983); *State v. McKenney,* 98 Idaho 551, 568 P.2d 1213 (1977); *People v. Wende,* 25 Cal. 3d 436, 158 Cal. Rptr. 839, 600 P.2d 1071 (1979). Commentators have found little that pleases them with the decision. *See, e.g.,* Hermann, *Frivolous Criminal Appeals,* 47 N.Y.U.L. Rev. 701 (1972); Pengilly, *Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal,* 9 Crim. Just. J. 45 (1986). Finally, practitioners find the *Anders* procedure either unworkable or distasteful or both.

Nevertheless, *Anders* is, as the majority points out, the "touchstone" of analysis in this case. *Anders* requires an appointed appellate defense attorney to act as an advocate even as he or she requests to withdraw from a case. The majority asserts that the discussion requirement in the court rule at issue in this case keeps appointed appellate defense counsel in the role of advocate because it insures "that the attorney has made an inquiry into the relative merits of the appeal and that the attorney's withdrawal request is valid and grounded in fact and in the law."

Majority opinion at page 10. It is not, however, the requirement that counsel search the record and research the law that the petitioner objects to in this case, but rather the requirement that counsel then place before the court any arguments that he or she has discovered which militate against the client's cause.

The United States Supreme Court specifically noted that it did not intend to "force appointed counsel to brief his case against his client." Defense counsel should be the client's advocate, not adversary. *Anders,* 386 U.S. at 745.

The majority explains that appointed appellate defense counsel's inclusion of arguments against the defendant is necessary to put the court on notice that the arguments in favor of the client are frivolous and to assist the court to make a correct decision about the potential merits of the appeal. Majority opinion at pages 9–10, 12. As the court recognized in *Anders,* 386 U.S. at 745, however, appointed appellate defense counsel provides sufficient assistance to the court simply by pointing out the possible arguments for the client. Appointed appellate criminal defense counsel's request to withdraw in itself puts the court on notice that counsel considers the arguments in the no-merit brief frivolous. Once raised, frivolous arguments by their very nature should not be difficult for a court to evaluate on its own without counsel supplying case authorities or factual references which militate against the appeal. Consequently, I conclude that there is no need to require defense counsel to assist the court by briefing the case against the client.

Counsel's filing a brief setting forth arguments against defendant's position is a task that benefits the court but not the client. Accordingly, such a task is

more properly assigned to an amicus curiae than to an advocate. The *Anders* court condemned procedures that place appointed appellate defense counsel in the role of amicus curiae rather than in the role of advocate for the defendant. 386 U.S. at 744. The Wisconsin requirement that appointed appellate defense counsel who files a no-merit brief must discuss therein the reasons why the appeal lacks merit violates the plain meaning and clear intent of *Anders* by transforming appointed appellate defense counsel from an advocate into an adversary or an amicus.

The disenchantment with our rule evidenced in this case and the widespread disenchantment with *Anders* indicate that the dilemma of appointed counsel who does not wish to prosecute a frivolous appeal deserves additional study to devise a solution that is more satisfactory to counsel yet is equally sensitive to the rights of indigent defendants, to the responsibilities of appointed counsel, and to the needs of the judicial system.

In its rulemaking capacity this court has the power to authorize a study of the rule and its effect on appointed appellate defense attorneys who feel that their clients' appeals are frivolous but who nevertheless cannot dissuade their clients from prosecuting the appeals. Such a study is the kind of response that this court should consider when presented with a challenge that raises significant doubts concerning the wisdom of the rule, even if the constitutional arguments against the rule do not persuade the court. Thus, I believe that even if the majority is convinced the rule is constitutional, it should initiate a reconsideration of the rule.

Accordingly, I dissent.

I am authorized to state that CHIEF JUSTICE NATHAN S. HEFFERNAN and JUSTICE WILLIAM A. BABLITCH join in this dissent.

Office of the Clerk

SUPREME COURT

STATE OF WISCONSIN

RECEIVED
MAR 26 1986
Office of State Public Defender
Post-Conviction Division
Milwaukee, WI

Madison, March 27, 1986

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Hon. William R. N
Presiding Judge
Hon. Ted E. Weden
Hon. Michael T. S
Court of Appeals,
District I
901 N. 9th Street
Milwaukee, WI 53

e Court today announced an order in your case as follows:

State ex rel. Ellis T. McCoy v.
Wisconsin Court of Appeals, District I Case No 86-0172-W

On January 24, 1986 a petition was filed seeking a supervisory writ to prohibit the Court of Appeals from striking the no merit brief previously filed in the appeal and ordering counsel for the defendant to provide reasons why the issues presented in that brief lacked merit. The petition also sought a declaratory judgment that sec. (Rule) 809.32(1), Stats., to the extent that it requires an attorney appointed to represent a criminal defendant in an appeal to discuss in a no merit brief why the issues that might arguably support the appeal lack merit, is unconstitutional. With respect to the latter, the petition constitutes a request for leave to commence an original action, pursuant to sec. (Rule) 809.70, Stats.

Pursuant to the court's February 21, 1986 order, a response to the petition was filed in which the respondent concurred in the request to commence an original action for declaratory judgment but objected to the granting of a supervisory writ of prohibition.

On March 13, 1986 the petitioner filed a motion requesting permission to file a brief or a reply to the respondent's brief submitted with the response. The respondent filed a response in opposition to the motion on March 19, 1986.

APPENDIX B

IT IS ORDERED that the petition, insofar as it seeks a declaratory judgment with respect to the constitutionality of sec. (Rule) 809.32(1), Stats., is granted.

IT IS FURTHER ORDERED that the petitioner shall file a brief on the merits within 40 days of the service of this order; within 30 days of the service of the petitioner's brief the respondent shall file a brief or a statement that no responsive brief will be filed; within 15 days of the service of the respondent's brief the petitioner shall file a reply brief or a statement that a reply brief will not be filed.

IT IS FURTHER ORDERED that the petition, insofar as it seeks a supervisory writ of prohibition, is held in abeyance pending further order of the court.

MARILYN L. GRAVES

B-2

Clerk of Supreme Court.

MENT OF HEALTH AND SOCIAL SERVICES
of Corrections
(Rev. 3/82)

STATE OF WI
Wiscon
Secti

JUDGMENT OF CONVICTION
SENTENCE TO WISCONSIN STATE PRISONS

STATE OF WISCONSIN, Plaintiff
v.
LIS T. McCOY Defendant

STATE OF WISCONSIN, Circuit Court Branch
County Milwaukee
1-10-53 Defendant Date of Birth
Court Case No. K-3561

The defendant entered his/her plea(s) of ☐guilty ☒not guilty ☐no contest;

3 The ☒Court ☐Jury found the defendant guilty of:

	Wis. Statute(s) Violated	Felony or Misdemeanor (F or M)	Com
Second degree sexual assault	940.225 (2)(e)	F	6-19-8
Abduction	940.32 (1)	F	6-19-82

d in this County, and

On December 2, 1983, the Court inquired of the defendant why sentence should not be pronounced, and no o the contrary being shown or appearing to the Court, the Court having accorded the district attorney, defense counsel, and the defendant address the Court regarding sentence; and upon all the evidence, records and proceedings, the Court pronounced Judgment as follows:

IT IS ADJUDGED that the defendant is convicted as found guilty, and is sentenced to the Wisconsin State Prisons for an indeterminat than SIX (6) YEARS - each count, consecutive

fendant to pay $30 victim/witness surcharge, as to EACH count.

IT IS ADJUDGED that 69 days sentence credit are due pursuant to Sec. 973.155, Wis. Stats.

IT IS ORDERED that the Clerk deliver a duplicate original of this Judgment to the Sheriff, and that the Sheriff shall forthwith deliver the . of this Judgment to the Dodge Correctional Institution (Reception Cente of Waupun, Wi.

(affix seal)

BY ORDER OF THE COURT: Signature of Judge, Deputy or Clerk of Court

Name of Judge	Date Signed
WILLIAM A. JENNARO	December 2, 19
Name of Defense Attorney	Name of District Attorney
Mark Nimmemann	E. Michael McCa

APPENDIX C

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 84-929-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ELLIS T. McCOY,

Defendant-Appellant.

MOTION TO DETERMINE CONSTITUTIONALITY OF RULE 809.32(1) AND TO CLARIFY SCOPE OF ATTORNEY'S REPRESENTATION ON APPEAL

Now comes the above-named defendant, Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, and hereby moves this court for an order determining the constitutionality of Rule 809.32(1) and to clarify the scope of the attorney's representation, pursuant to Rule 809.14, on the following grounds:

1. On January 24, 1984, the above-name attorney was appointed to represent the above-named defendant for purposes of appeal. The final transcript was filed April 5, 1984, and a notice of appeal was filed May 4, 1984.

2. After doing research in preparation for filing the brief in this action, which would be due on August 20, 1984 pursuant to Rule 809.30(2)(f) and an extension granted by this court on July 24, 1984, this attorney has concluded that further appellate proceedings on behalf of Mr. McCoy would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967) and Rule 809.32(1).

3. This attorney discussed the matter by telephone with Mr. McCoy on August 10 and 13, 1984. Mr. McCoy was advised that his options included voluntarily dismissing the appeal, proceeding with the appeal pro se or requiring this attorney to file a no merit report. Mr. McCoy has asked this attorney to file a no merit report.

4. The United States Supreme Court in Anders, supra, has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae, 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. Id. If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. Id. That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. Id. After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." Id. If the appeal is frivolous, the court may grant the

request to withdraw and dismiss the appeal, and if not, the the defendant is entitled to appointed counsel for the appeal The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

386 U.S. at 745.

5. The Wisconsin Supreme Court, consistent with Anders has held that the Wisconsin no merit procedure which was i existence prior to the creation of Rule 809.32(1) did no require counsel to argue against his client but demanded fair evaluation of the record and a search for meritoriou grounds therein. Cleghorn v. State, 55 Wis. 2d 466, 472, 19 N.W.2d 577 (1972).

6. Rule 809.32(1) requires that if an attorney is o the opinion that further appellate proceedings on behalf o the defendant would be frivolous and without any arguabl merit within the meaning of Anders, the attorney shall fil with the court a brief in which is stated anything in th record that might arguably support the appeal and a discussio of why the issue lacks merit.

7. While it is clear pursuant to Anders that a no merit brief is required when an attorney reaches that determination and the defendant wishes to pursue his or her appeal, defendant submits that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on defendant's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by Anders,

but would be in the awkward position of arguing why hi client's appeal lacks merit. This would be contrary to th mandate of Anders that the attorney not brief the case agains the client and that the attorney act as an advocate. Since a attorney is legally bound to represent the best interests o his or her client until relieved from further representatio by this court, defendant submits that a discussion of why an issue lacks merit would violate the sixth amendment.

8. Defendant submits that a no merit report consisten with Anders and with the remainder of Rule 809.32(1) woul protect the interests of the client while informing the cour that further proceedings would be frivolous. The attorne would be able to present the court with any issue which migh arguably support the appeal, giving the court, not counsel, a opportunity to decide whether the appeal is frivolous. Such a procedure would not put the attorney in the position of arguing against his client.

9. This attorney, while believing the portion of Rule 809.32(1) which requires a discussion of why the issue lacks merit to be unconstitutional, will file whatever type of no merit report this court determines to be appropriate. This attorney suggests that the order determining the constitutionality of the challenged portion of the Rule be published. The no merit report will be due on October 2, 1984, based on the service of the transcripts, not including the time that is tolled due to the filing and determination of this motion.

WHEREFORE, this attorney respectfully requests that this court determine the constitutionality of that portion of 809.32(1) which requires a discussion of why any issue lacks merit, and clarify the scope of this attorney's representation on appeal.

Dated this 14 day of August, 1984.

Respectfully submitted,

LOUIS B. BUTLER, JR.
Assistant State Public Defender

Attorney for Defendant-Appellant.

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Ellis T. McCoy
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DISTRICT I
Office of the Clerk
COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

Madison, September 7, 1984

To:
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821 W. State Street
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Kirbie Knutson
Asst. Attorney General

Louis B. Butler, Jr.
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230 W. Wells St., Rm. 500
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You are hereby notified that the Court entered the following order:

84-929-CR State of Wisconsin v. Ellis T. McCoy

Before Wedemeyer, P.J., Moser and Sullivan, JJ.

The defendant, by his attorney, has moved the court for an order determining the constitutionality of Rule 809.32(1), Stats., and clarifying the scope of an attorney's representation in cases where the attorney concludes that further appellate proceedings on behalf of his client would be frivolous and without arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967). The defendant's counsel states that he believes that the portion of Rule 809.32(1) which requires a discussion of why the appeal lacks merit infringes on the defendant's sixth amendment right to counsel, but that he will file whatever type of no merit report this court determines to be appropriate.

The motion is denied. The general rule is that courts do not decide abstract principles of law, City of Racine v. J-T Enterprises of America, Inc., 64 Wis.2d 691, 700, 221 N.W.2d 869, 874 (1974), or render advisory opinions, Smith v. Pershing, 10 Wis.2d 352, 357, 102 N.W.2d 765, 768 (1960). Judicial restraint dictates not passing on an issue until the facts of the proper case present a justiciable controversy. State ex rel. Deisinger v. Treffert, 85 Wis.2d

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MILWAUKEE, WISCONSIN

APPENDIX E

257, 271, 270 N.W.2d 402, 409 (1978). A justiciable controversy constitutes a controversy in which a claim of right is asserted against one who has an interest in contesting it. Pension Management, Inc. v. DuRose, 58 Wis.2d 122, 128, 205 N.W.2d 553, 555 (1973). The justiciable controversy requirement compels the courts to refuse to determine hypothetical or future rights. See id. at 128, 205 N.W.2d at 555-56.

Based on these standards, we conclude that the relief requested in the motion should not be granted. The motion in effect requests this court to render an advisory opinion informing the defendant's counsel of whether this court would conclude that a no merit report filed in accordance with Rule 809.32(1) deprived the defendant of assistance of counsel as required by the sixth amendment to the U.S. Constitution. Since a no merit report has not yet been filed, the defendant has not and cannot yet claim that he was deprived of his right to assistance of counsel. Consequently, no justiciable controversy exists involving the constitutionality issue. The constitutionality issue therefore cannot properly be addressed by this court at this time.

Upon the foregoing reasons,

IT IS ORDERED that the motion to determine the constitutionality of Rule 809.32(1), Stats., and to clarify the scope of representation is denied.

Marilyn L. Graves
Clerk of Court of Appeals

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 84-929-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ELLIS T. McCOY,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION
AND SENTENCE ENTERED DECEMBER 2, 1983, IN CIRCUIT COURT,
MILWAUKEE COUNTY, HONORABLE WILLIAM A. JENNARO, PRESIDING
PURSUANT TO RULE 809.32(1).

BRIEF OF DEFENDANT-APPELLANT

LOUIS B. BUTLER, JR.
Assistant State Public Defender

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Attorney for Defendant-Appellant

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 84-929-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ELLIS T. McCOY,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED DECEMBER 2, 1983, IN CIRCUIT COURT, MILWAUKEE COUNTY, HONORABLE WILLIAM A. JENNARO, PRESIDING PURSUANT TO RULE 809.32(1).

BRIEF OF DEFENDANT-APPELLANT

INTRODUCTION

This attorney has concluded that further apellate proceedings on behalf of Mr. McCoy would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967) and Rule 809.32(1). The following brief has been prepared in compliance with Anders. However, because this attorney believes that the portion of Rule 809.32(1) which requires a discussion of why an issue

lacks merit is directly contrary to Anders and unconstitutional, this attorney cannot ethically take a position which would argue against his client or act as amicus curiae. See S.C.R. 20.34(1)(c) and (2)(a) (1984).

The United States Supreme Court in Anders, supra, has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae, 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. Id. If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. Id. That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. Id. After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." Id. If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

386 U.S. at 745.

The Wisconsin Supreme Court, consistent with Anders, has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. Cleghorn v. State, 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972).

Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders, the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

While it is clear pursuant to Anders that a no merit brief is required when an attorney reaches that determination and the defendant wishes to pursue his or her appeal, defendant and this attorney submit that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on defendant's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by Anders, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be contrary to the mandate of Anders that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further

representation by this court, defendant and this attorney submit that a discussion of why any issue lacks merit would violate the sixth amendment.

Defendant and this attorney submit that a no merit report consistent with Anders and with the remainder of Rule 809.32(1) would protect the interests of the client while informing the court that further proceedings would be frivolous. This attorney would be able to present the court with any issue which might arguably support the appeal, giving the court, not counsel, an opportunity to decide whether the appeal is frivolous. Such a procedure would not put the attorney in the position of arguing against his client. This attorney has therefore prepared this brief in compliance with Anders, and the brief will not include a discussion of why any issue lacks merit. This approach fulfills this attorney's ethical obligation to protect his client's sixth amendment right to counsel on appeal. S.C.R. 20.34(1)(c) and (2)(a) (1984).

ISSUES PRESENTED

1. Did the failure by the nurse at the House of Correction to give defendant the correct test to determine whether he had gonorrhea violate his rights to due process and a fair trial when the test was pursuant to a search warrant?

Trial court answered: No.

2. Did the ex parte hearing on the application for a search warrant and the execution of the search warrant at the

jail outside attorney's presence violate defendant's sixth amendment right to counsel?

Not answered by the trial court.

3. Was the evidence presented at trial sufficient to support a conviction for one count of second degree sexual assault and one count of abduction?

Trial court answered: Yes.

4. Was the sentence excessive?

Not answered by the trial court.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This is an Anders brief, and as such, is not usually appropriate for publication. Nevertheless, because a portion of Wisconsin's No Merit Rule may be unconstitutional, a decision by this court would either modify the existing rule or clarify it. Accordingly, publication would be warranted.

Because of the complex nature of the question of an attorney's responsibility when the client wishes to pursue a no merit appeal, oral argument is requested as to how a no merit report should be prepared.

STATEMENT OF THE CASE

This matter is before the court on appeal, pursuant to Rule 809.32(1), from the judgment of conviction and sentence entered December 2, 1983, of the appellant, in circuit court, Milwaukee County, Honorable William A. Jennaro presiding. Appellant McCoy (hereinafter "defendant") was convicted of one

count of second degree sexual assault, contrary to sec. 940.225(2)(a), and one count of abduction, contrary to sec. 940.32(1), Stats.

Upon conviction, defendant was sentenced to six years, each count, to be served consecutively at the Dodge Correctional Institute at Waupun.

STATEMENT OF FACTS

Ellis T. McCoy was charged with one count of second degree sexual assault and one count of abduction, contrary to secs. 940.225(2)(e) and 940.32(1), Stats. (2: 1-2).

On July 8, 1982, the state applied for a search warrant to obtain blood, saliva, head and pubic hair and a test for the possibility of venereal disease from the defendant (23: 2). A Detective Doyle learned that the victim, C.D., contracted gonorrhea as a result of the attack (23: 5). The state asserted that there is a possible leaving behind of seminal fluid from the assailant to the victim, and that a blood type could be determined from the fluid (23: 6). For comparison purposes, the Wisconsin Regional Crime Laboratory would need a blood sample, pubic and head hair samples and saliva (23: 7). Because Mr. McCoy was in custody, the test could be taken in the nurse's office of the Milwaukee County Jail by the nurse (23: 7). The officer testified that the nurse had taken numerous samples from other persons in the past (23: 7), and had training and experience in taking those samples.(23: 8).

The court found probable cause for the issuance of the search warrant to obtain, under medical supervision by a doctor or nurse qualified to perform the functions, the various samples (23: 9-10). The warrant specifically authorized the taking of blood and saliva samples, head and pubic hair samples and appropriate testing for gonorrhea by the nurse "pursuant to approved medical procedures" (22: 1). The transcript reflects that no appearance was made by the defendant or his attorney at the hearing (23: 1), which occurred July 8, 1982, after the preliminary hearing of June 19, 1982 (10: 1, et seq).

After receiving a doctor's report from Atlanta, the state decided to proceed with the prosecution (12: 3-4). The assistant district attorney thought that the medical evidence or opinions would dispose of the case, but found that they did not because the wrong test was performed (12: 3-4).

At trial, Nurse Mary Schuknecht of the County Jail testified that she came in contact with Ellis McCoy on July 8, 1982 pursuant to a search warrant (14: 25). She collected blood, saliva, head and pubic hair samples and conducted a test normally done by the jail for gonorrhea (14: 26). That test involved taking a swab of the urethra, putting it on a lab slide and sending it to the Milwaukee Health Department (14: 26). There were no facilities in the County Jail to take gonorrhea samples to be used for a culture as opposed to the slide analysis on that date (14: 27). All that was needed was a culture medium container (14: 29).

The results from the test that was done was negative for gonorrhea (14: 29).

Robert Bagley, a bacteriologist for the City of Milwaukee Health Department, testified that a culture was the preferred procedure for gonorrhea testing because it was a specific test for gonorrhea (14: 31-32). The "gram stain" slide method at best was only presumptive evidence of gonorrhea (14: 31-32, 35-36).

The test performed on Mr. McCoy was largely inconclusive (14: 35-36). There were very few cells on the slide resembling gonorrhea (14: 38-40).

Dr. Michael Dailey testified that it was not always necessary to receive treatment in order to get rid of gonorrhea (14: 49). One can shed the organism by going to the bathroom (14: 49-50).

The victim, C.D., had gonorrhea (14: 50). The testing of Mr. McCoy does not establish either way whether he had gonorrhea or not (14: 54). That is because of the possibility of error due to the slide test (14: 57). A culture would have been the appropriate test (14: 58).

Mary Peth Varriale testified that the vaginal swab of C.D. was negative for the presence of semen or spermatozoa (15: 76). No seminal stains were found on a pair of her blue panties, and the only hair found on the panties belonged to C.D. (15: 77-78). However, another pair of panties had a stain containing intact spermatozoa (15: 79). Ms. Varriale attempted to individualize the stain as to the A, B, or O blood

group of the person who contributed the semen, but the results were inconclusive (15: 81). She did not find any of Mr. McCoy's hair or saliva on the victim's clothing (15: 85).

C.D. testified that at approximately 10:00 p.m. she received a phone call from the defendant (15: 92). He asked if her sister and mother were home, and when she said no, he asked if he could come by and help plan a birthday party for his girlfriend (15: 94). C.D. told him he could not come over (15: 95). She called her mother on the phone and told her she was scared, so her mother told her to lock the doors and go upstairs (15: 96).

Five minutes later, C.D. saw Mr. McCoy standing outside a window (15: 96-97). McCoy rang the doorbell, and C.D. told him to leave, but he would not leave (15: 99). McCoy told that he was planning a surprise party for his girlfriend and wanted a pencil and paper (15: 101). He also wanted a kiss (15: 102). She gave him the paper and locked the door (15: 103-104). Five minutes later, she looked to see if he had gone, opening the door (15: 104). McCoy grabbed her, took her to the car, drove to a dark place and assaulted her (15: 106-114). Her glasses were knocked off during the struggle (15: 106-107).

After the assault, McCoy went to a gas station to get gas (15: 211). There were other people at the station, but C.D. did not get out of the car or run away, nor did she tell anyone else she had been assaulted (16: 224). He told her not to tell anyone (16: 235). He also called later to ask her if she was alright and told her to take a shower (16: 249).

Detective Patrick Doyle, after arriving at the victim's home found a package of Salem cigarettes and a lense and the left bow for C.D.'s eyeglasses in the yard (17: 5).

Ellis McCoy admitted going to C.D.'s house and taking her to the gas station (17: 36-39). He denied sexually touching C.D. (17: 44-45). He also has a defect in his right arm which prevents him from lifting anything heavy (17: 65).

Leo Draveling, who used to live with the victim's mother, was of the opinion that C.D. was untruthful, and that her fourth grade teacher and superintendent of her school were of the same opinion (17: 87,90-93).

The trial court in evaluating the evidence[1/] recognized that the gonorrhea test done was unsatisfactory but found nevertheless that the defendant was guilty beyond a reasonable doubt (17: 133-137). Upon conviction, Mr. McCoy was sentenced to indeterminate terms of not more than six years, each count, consecutive to each other, for the abduction and sexual assault charges (18: 14).

Further facts will appear in the argument.

1/ The jury had been waived by the defendant against counsel's advice mid-trial (15: 64-67).

ARGUMENT

I. THE FAILURE TO CONDUCT THE APPROPRIATE TEST TO DETERMINE WHETHER DEFENDANT HAD GONORRHEA RESULTED IN THE DESTRUCTION OF EVIDENCE MATERIAL TO THE DEFENSE.

The Wisconsin Supreme Court has ruled that the destruction of evidence material to the defense violates due process. State v. Amundson, 69 Wis. 2d 554, 577-580, 230 N.W.2d 775, 788 (1975). In reaching its decision, the court adopted the reasoning set forth in United States v. Bryant, 142 U.S. App. D.C. 132, 439 F.2d 642 (D.C. Cir. 1971).

Other decisions which have adopted the Bryant reasoning have set forth a three-pronged test to determine whether the destruction of material evidence violates due process: (1) the state's bad faith or negligence; (2) the importance of the evidence; and (3) the other evidence of guilt adduced at trial. Johnston v. Pittman, 731 F.2d 1231, 1234 (5th Cir. 1984); and Armstrong v. Collier, 536 F.2d 72, 78 (5th Cir. 1976). Applying this test to the facts of this case, there can be no doubt that the failure to conduct the correct gonorrhea test was due to the state's negligence, as the trial court indicated that the test conducted was unsatisfactory (17: 133-137). There can also be no question that the correct test was material and important to the defense, as the victim had gonorrhea and the inconclusive test indicated that there was no presence of gonorrhea in the defendant (14: 29, 31-36, 38-40, 50). If the defendant did not have gonorrhea, then not only did he probably not commit the assault on the victim, but the victim would now have a motive for falsely accusing

defendant in order to explain how she contracted gonorrhea in the first place. State ex rel. Lyons v. DeValk, 47 Wis. 2d 200, 204-206, 177 N.W.2d 106 (1970). Thus, the only question to be determined is whether the other evidence at trial was so lacking that the defendant was deprived of due process.

Defendant submits that absent the correct test for gonorrhea, the remaining evidence at trial is so lacking in probative value that a sufficient question has been raised as to whether he had gonorrhea. Defendant submits that if he did not have the disease, then he could not have committed the offense. Therefore, a new trial should be ordered as to both counts.

II. THE TAKING OF BLOOD, HAIR, SALIVA AND GONORRHEA TEST SAMPLES OUTSIDE THE DEFENSE ATTORNEY'S PRESENCE, FOLLOWING AN EX PARTE PROCEEDING WHEN THE SEARCH WARRANT WAS APPLIED FOR, VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

The complaint in this action was filed June 21, 1982. the information in this action was filed June 29, 1982 (3: 1). Thus, the defendant's sixth amendment right to counsel attached, as formal charging had already taken place. Brewer v. Williams, 430 U.S. 387, 398 (1977).

The search warrant proceeding took place July 8, 1972 (23: 1, et seq.). The record reflects that no appearance was made by defendant or counsel at the hearing (23: 1). Moreover, there is nothing in the record to indicate that defense counsel was present when the warrant was executed at the jail.

Sec. 971.04 provides the defendant has a right to be present at any evidentiary hearing. Evidence was taken during the search warrant proceeding, yet neither defendant nor counsel were present. Thus, defendant submits that his sixth amendment right to counsel and his statutory right to be present were violated when the proceedings were conducted ex parte.

Defendant recognizes that normally, pre-search proceedings are ex parte and conducted in secrecy, as the subject of the search should not be tipped off to the application lest he destroy or remove evidence. Sec. 968.21. See Franks v. Delaware, 438 U.S. 154, 169 (1978). However, defendant's case falls within a different category than the normal search, as formal proceedings have already been initiated against him. Second, there is no chance that the evidence can be removed or destroyed, as defendant is in custody. Finally, an adversary hearing should be required before the warrant is issued because of the nature of the search and the type of intrusion the defendant is facing. Schmerber v. California, 384 U.S. 757, 768 (1966); United States v. Crowder, 543 F.2d 312, 316 (1975), cert. denied, 429 U.S. 1062 (1977).

Had defense counsel been present at the search warrant proceeding, he might have pointed out to the court exactly what the appropriate test would be for gonorrhea, so that the court would have been in a position of specifying what test should be done. Alternatively, had counsel been present at

the jail when the warrant was executed, then he could have objected to the procedure that was actually done, been in a position to know that the test was the wrong one, and either challenge the execution of the warrant or conduct independent tests.

Defendant is mindful of the fact that no objection was made either to the ex parte proceeding or to the absence of counsel's presence at the jail, but submits that because the error affects the integrity of the factfinding process, this court must review it as plain error. Sec. 901.03(4), Stats. See also State v. Gustafson, 119 Wis. 2d 676, 693, ___ N.W.2d ___ (1984); and State v. Baldwin, 101 Wis. 2d 441, 446, 304 N.W.2d 742 (1981). Thus, defendant submits that a new trial be ordered in this action as to each count.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION.

C.D. had gonorrhea. The test given to defendant, while inconclusive, was negative for gonorrhea. Thus, if defendant did not have the disease, as the test results indicate, then C.D. had a motive for falsifying her testimony.

The only corroboration for the assault, the broken glasses and the cigarette package, could have easily been manufactured by C.D. in an attempt to explain her disease. The semen found on her underpants cannot be tied to him, and there was no way to tell the age of the stain. Thus, that evidence is not corroborative of the assault and abduction. Given Leo Draveling's opinion that he, C.D.'s fourth grade

teacher and the superintendent of her school thought she was untruthful (17: 87, 90-93), defendant submits that this case falls within the rule of Syvock v. State, 61 Wis. 2d 411, 414-416, 213 N.W.2d 11 (1973). Accordingly, defendant submits that the evidence is insufficient to support a conviction in this action.

IV. THE SENTENCE IN THIS ACTION IS EXCESSIVE.

Defendant recognizes that ordinarily appellate courts will not interfere with the sentencing discretion of the trial court. Ocanas v. State, 70 Wis. 2d 179, 233 N.W.2d 457 (1975). Nevertheless, defendant submits that even if this court affirms the convictions in this case, the abduction and the sexual assault arose out of the same set of facts and same incident, so that concurrent sentences are warranted. Thus, this court should modify the two six year sentences to concurrent terms.

CONCLUSION

In light of the foregoing, defendant respectfully requests that this court reverse the judgment of the trial court and order a new trial as to each count. Alternatively, defendant requests that his sentences be modified to concurrent terms.

In addition, defendant respectfully requests that this court determine the constitutionality of Rule 809.32(1) and the scope of his attorney's representation under that rule.

Finally, this attorney respectfully requests permission to withdraw as counsel.

Respectfully submitted,

LOUIS B. BUTLER, JR.
Assistant State Public Defender

230 West Wells Street, Room 500
Milwaukee, Wisconsin 53203

Attorney for Defendant-Appellant

cc: Kirbie Knutson
Assistant Attorney General

Eric Schulenberg
Chief, Appellate Division

Ellis T. McCoy

DISTRICT I

Office of the Clerk

COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

Madison, April 16, 1985

To:

E. Michael McCann
District Attorney
821 W. State Street
Milwaukee, WI 53233

Ellis T. McCoy
P. O. Box 147
Fox Lake, WI 53933

Kirbie Knutson
Asst. Attorney General

Louis B. Butler, Jr.
Asst. State Public Defender
819 N. Sixth St., 8th Fl.
Milwaukee, WI 53203

You are hereby notified that the Court entered the following order:

84-929-CR-NM State of Wisconsin v. Ellis T. McCoy

Before Wedemeyer, P.J., Moser and Sullivan, JJ.

Ellis McCoy was found guilty of one count of second-degree sexual assault and one count of abduction. Assistant State Public Defender Louis Butler was appointed to represent McCoy on appeal. Butler filed a notice of appeal on McCoy's behalf but subsequently concluded that there was no merit to the appeal.

Rule 809.32(1), Stats., provides that:

> If an attorney appointed under s. 967.06(3) or Rule 809.30 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S.738 (1967), the attorney shall file with the court of appeals three copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service.

Butler has now filed his brief in this matter. The brief suggests four issues which might arguably support the appeal but does not indicate why those issues lack merit. Accordingly, the brief is not in compliance with Rule 809.32(1), Stats.

Upon the foregoing reasons,

IT IS ORDERED that the brief previously filed in this matter is struck. Assistant State Public Defender Louis Butler is directed to file a brief in compliance with Rule 809.31(1), Stats., within fifteen days of the date of this order.

Marilyn L. Graves
Clerk of Court of Appeals

RECEIVED
APR 18 1985
Office of State Public Defender
Post-Conviction Division
Milwaukee, WI

APPENDIX G

STATE OF WISCONSIN

IN SUPREME COURT

Case No. _____

STATE OF WISCONSIN EX REL.
ELLIS T. McCOY,

Relator,

v.

From: Appeal No. 84-929-CR-NM
Trial No. K-3561

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Respondent.

PETITION FOR SUPERVISORY WRIT OF PROHIBITION
AND DECLARATION OF RELATOR'S RIGHTS

The petition of Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, pursuant to Rule 809.71, Stats., hereby petitions this court for a supervisory writ of prohibition prohibiting the court of appeals from striking the brief previously filed and prohibiting the court of appeals from ordering counsel to provide reasons why the issues presented in that brief lack merit, and petitions this court, pursuant to Rule 809.70, Stats., to determine the constitutionality of Rule 809.32(1) and whether the rule violates relator's sixth amendment right to counsel, on the following grounds:

1. The petitioner, Louis B. Butler, Jr., represents the relator, in the case of State of Wisconsin v. Ellis T. McCoy, Case No. 84-929-CR-NM, now pending in the court of appeals, District I.

2. Relator moved for a determination of the constitutionality of Rule 809.32(1) before the court of appeals in a motion dated August 14, 1984.

3. The court of appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." See September 7, 1984 order, p. 2 (attached).

4. A "No Merit" brief was filed by this attorney on October 22, 1984, which was in compliance with Anders v. California, 386 U.S. 738 (1967) and the subsequent decision of Evitts v. Lucey, 469 U.S. ___, 83 L.Ed.2d 821, 828 (1985), but not in compliance with Rule 809.32(1).

5. The court of appeals, District I, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included.

APPENDIX H

The court also ordered that petitioner file a new brief within 15 days of the date of that order which is in compliance with the Rule.

6. The United States Supreme Court in Anders, supra, has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae, 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. Id. If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. Id. That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. Id. After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." Id. If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

7. The Wisconsin Supreme Court, consistent with Anders, has held that the Wisconsin no merit procedure which was in

existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. Cleghorn v. State, 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972). This Court has not as yet had an opportunity to review the current procedure since the creation of Rule 809.32(1).

8. The United States Supreme Court very recently has reaffirmed its prior holding in Anders, stating that the attorney ". . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." Evitts v. Lucey, 83 L.Ed.2d at 828.

9. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders, the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the [illegible]ks merit.

10. Pet[illegible] and relator submit that the portion of sec. 809.32(1) [illegible] requires a discussion of why the appeal lacks merit would infringe on relator's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward position of arguing why his client's appeal lacks

merit. This would be directly contrary to the mandates of Anders and Lucey that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, petitioner and relator submit that a discussion of why any issue lacks merit violates the sixth amendment.

11. Because petitioner believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is unconstitutional, petitioner cannot ethically take a position which would argue against his client or act as a friend of the court. This Court's rules require that while serving as an advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. SCR 20.34(1)(c) (1984). This Court has also determined that an advocate may urge any permissible construction of the law favorable to his or her client, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification or reversal of the law. SCR 20.34(2)(c) (1984).

12. An order by this Court prohibiting the court of appeals from striking the brief previously filed and from ordering counsel to provide reasons why the issues lack merit is necessary in order to protect relator's sixth amendment right to counsel. It would resolve the conflict that exists

with the Wisconsin Rule and United State Supreme Court decisions.

13. An order by this Court as stated in para. 12 is necessary to prevent petitioner from violating this Court's ethical rules.

14. Petitioner would note that the No Merit procedure for petitions for review is substantially different than that for appeals, and that this Court does not require an attorney to provide reasons why a petition for review lacks merit. Compare 809.32(1) and (4).

15. Petitioner submits that the brief already filed in this action meets all of the requirements set forth by Anders and Lucey.

16. A declaration of relator's sixth amendment right to counsel and whether Rule 809.32(1) violated that right is necessary before any new brief is written to prevent petitioner from violating relator's sixth amendment right to counsel.

17. Petitioner and relator currently have no other adequate remedy at law, other than this petition, to protect relator's rights and prevent petitioner from violating his ethical duty.

WHEREFORE, petitioner respectfully requests that this Court strike that portion of rule 809.32(1) which requires that the attorney provide reasons why the issue lacks merit as unconstitutional, prohibit the court of appeals from striking

the brief already filed, and prohibit the court of appeals from requiring petitioner to provide reasons why relator's appeal lacks merit.

Dated this 23rd day of April, 1985.

Respectfully submitted,

LOUIS B. BUTLER, JR.
Assistant State Public Defender

819 North Sixth St., Room 821
Milwaukee, Wisconsin 53203

ERIC SCHULENBERG
Chief, Appellate Division

340 W. Washington Ave.
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cc: Ellis T. McCoy
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Fox Lake, WI 53933

Ms. Kirbie Knutson
Assistant Attorney General

Hon. Ted E. Wedemeyer
Court of Appeals, District I

Hon. William R. Moser
Court of Appeals, District I

Hon. Michael T. Sullivan
Court of Appeals, District I

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

RECEIVED
MAY - 9 1985
Office of State Public Defender
Post-Conviction Unit, Division
Milwaukee, WI

Louis B. Butler, Jr.
Assistant State Public Defender
819 North Sixth Street, 8th Floor
Milwaukee, WI 53203

Madison, May 8, 1985

Ellis T. McCoy
P. O. Box 147
Fox Lake, WI 53933

J. Denis Moran
Director of State Courts

Hon. Ted E. Wedemeyer, Jr.
Hon. William R. Moser
Hon. Michael T. Sullivan
Court of Appeals, District I
Suite 609, Courthouse
901 North 9th Street
Milwaukee, WI 53233

James H. McDer
Assistant Atto
General
P. O. Box 7857
Madison, WI 53

e Court today announced an order in your case as follows:

State ex rel. McCoy v. Court of Appeals, District I — Case No. 85-0781-W

On April 24, 1985 Assistant State Public Defender Louis B. Butler, Jr., filed a petition for a supervisory writ to prohibit the Court of Appeals, District I, from striking the brief he filed in an appeal pending in that court and prohibiting it from ordering him to provide reasons why the issues presented in that brief lack merit. The petition also asks this court, pursuant to sec. (Rule) 809.70, Stats., to determine the constitutionality of sec. (Rule) 809.32(1), Stats.

In the pending appeal, the petitioner moved the Court of Appeals for a determination of the constitutionality of sec. (Rule) 809.32(1), Stats., and the Court of Appeals denied that motion by order of September 7, 1984, on the ground that, because a no merit report had not been filed, "no justiciable controversy exists involving the constitutionality issue. The constitutionality issue therefore cannot properly be addressed by this court at this time." From this it appears that the petitioner is not entitled to a supervisory writ and declaratory relief from this court for the reason that he has an adequate remedy in the Court of Appeals by renewing his motion for a determination of the constitutionality of sec. (Rule) 809.32(1), Stats.

APPENDIX I

IT IS ORDERED, pursuant to sec. (Rule) 809.71, Stats., that the petition for supervisory writ and declaratory relief is denied.

Shirley S. Abrahamson, J., dissents.

MARILYN L. GRAVES

Clerk of Supreme Court.

I-2

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 84-929-CR-NM

ELLIS T. McCOY,

Defendant-Appellant.

MOTION TO DETERMINE CONSTITUTIONALITY OF RULE 809.32(1) AND TO CLARIFY SCOPE OF ATTORNEY'S REPRESENTATION ON APPEAL

NOW COMES the above-named defendant, Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, and hereby moves this court for an order determining the constitutionality of Rule 809.32(1) and to clarify the scope of this attorney's representation, pursuant to Rule 809.14 and the order of the Wisconsin Supreme Court in State ex rel. McCoy v. Court of Appeals, District I, No. 85-0781-W, on the following grounds:

1. Defendant moved for a determination of the constitutionality of Rule 809.32(1) before the court of appeals in a motion dated August 14, 1984.

APPENDIX J

2. The Court of Appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." See September 7, 1984 order, p. 2 (attached).

3. A "No Merit" brief was filed by this attorney on October 22, 1984, which was in compliance with Anders v. California, 386 U.S. 738 (1967) and the subsequent decision of Evitts v. Lucey, 469 U.S. ___, 83 L.Ed.2d 821, 828 (1985), but not in compliance with Rule 809.32(1).

4. The Court of Appeals, District I, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included. The court also ordered that defendant file a new brief within 15 days of the date of that order which is in compliance with the Rule (attached).

5. Defendant filed a petition for supervisory writ of prohibition and declaration of relator's rights in the Wisconsin Supreme Court in State ex rel. McCoy v. Wisconsin Court of Appeals, District I, No. 85-0781-W, dated April 23, 1985.

6. The Wisconsin Supreme Court denied that petition on May 8, 1985, ruling that petitioner had an adequate remedy at

J - 2

law by renewing the motion for a determination of the constitutionality of the Rule in the Court of Appeals (attached).

7. The United States Supreme Court in Anders, supra, has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae, 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. Id. If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. Id. That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. Id. After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." Id. If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

8. The Wisconsin Supreme Court, consistent with Anders, has held that the Wisconsin no merit procedure which was in

J - 3

existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. Cleghorn v. State, 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972). The appellate courts of this state have not as yet had an opportunity to review the current procedure since the creation of Rule 809.32(1).

9. The United States Supreme Court very recently has reaffirmed its prior holding in Anders, stating that the attorney ". . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." Evitts v. Lucey, 83 L.Ed.2d at 828.

10. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders, the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

11. Defendant submits that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on his sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward

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position of arguing why his client's appeal lacks merit. This would be directly contrary to the mandates of Anders and Lucey that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, defendant submits that a discussion of why any issue lacks merit violates the sixth amendment.

12. Because counsel believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is unconstitutional, counsel cannot ethically take a position which would argue against his client or act as a friend of the court. The Wisconsin Supreme Court's rules require that while serving as an advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. SCR 20.34(1)(c) (1984). The Court has also determined that an advocate may urge any permissible construction of the law favorable to his or her client, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification or reversal of the law. SCR 20.34(2)(c) (1984).

13. An order by this Court determining the constitutionality of the no merit rule is necessary in order to protect defendant's sixth amendment right to counsel. It would resolve the conflict that exists with the Wisconsin Rule and United State Supreme Court decisions.

J-5

14. An order by this Court as stated in para. 13 is necessary to prevent petitioner from violating the Supreme Court's ethical rules.

15. Petitioner would note that the no merit procedure for petitions for review is substantially different than that for appeals, and that the Supreme Court does not require an attorney to provide reasons why a petition for review lacks merit. Compare 809.32(1) and (4).

16. Petitioner submits that the brief already filed in this action meets all of the requirements set forth by Anders and Lucey.

17. A determination of the no merit rule, defendant's right to counsel and whether Rule 809.32(1) violates that right is necessary before any new brief is written to prevent petitioner from violating defendant's sixth amendment right to counsel.

WHEREFORE, petitioner respectfully requests that this Court strike that portion of Rule 809.32(1) which requires that the attorney provide reasons why the issue lacks merit as unconstitutional, and accept the brief that has already been filed in this action.

Dated this 4th day of June, 1985.

Respectfully submitted,

LOUIS B. BUTLER, JR.
Assistant State Public Defender

819 North Sixth Street, Room 821
Milwaukee, Wisconsin 53203

D-6

ERIC SCHULENBERG
Chief, Appellate Division

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Attorneys for Defendant-Appellant.

cc: Mr. Ellis T. McCoy
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Ms. Kirbie J. Knutson
Assistant Attorney General

D-7

DISTRICT I

Office of the Clerk

COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

Amended January 16, 1986
Madison, January 15, 1986

To: E. Michael McCann
James H. McDermott
Louis B. Butler, Jr.
Ellis T. McCoy
Hon. William A. Jennaro

Clerk of Circuit Court
(L.C. #K-3561)
(Milwaukee County)

RECEIVED
JAN 17 1986
Office of State Public Defender
Post-Conviction Division
Milwaukee, WI

You are hereby notified that the Court entered the following opinion and order:

84-929-CR-NM State of Wisconsin v. Ellis T. McCoy

Before Moser, P.J., Wedemeyer and Sullivan, JJ.

Ellis T. McCoy (McCoy) has renewed his motion for an order determining the constitutionality of Rule 809.32(1), Stats., and to clarify the scope of his counsel's representation pursuant to Rule 809.14, Stats., and order of the Wisconsin Supreme Court in State ex rel. McCoy v. Court of Appeals, District I, No. 85-0781-W. The procedural facts of the case follow.

On August 14, 1984, McCoy moved for determination of the constitutionality of Rule 809.32(1), Stats., before this court. The court denied the motion on September 7, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no

APPENDIX K

justifiable controversy exists involving the constitutionality issue." Subsequently, McCoy filed a no merit brief which was not in compliance with Rule 809.32(1), Stats. The court, in an order dated April 16, 1985, ordered that the no merit brief previously filed be struck for noncompliance with Rule 809.32(1), Stats. The court of appeals ordered McCoy to file a new brief in compliance with Rule 809.32(1), Stats., within fifteen days of the date of the order.

The defendant then filed a petition for a supervisory writ of prohibition and declaration of his rights in the Wisconsin Supreme Court in Wisconsin ex rel. McCoy v. Wisconsin Court of Appeals, District I, No. 85-0781-W. The supreme court denied the petition on May 8, 1985. It ruled that McCoy had an adequate remedy at law by renewing his motion for determination of the constitutionality of Rule 809.32(1), Stats., in the court of appeals. In accordance with that direction from the supreme court, McCoy has filed the present motion again requesting our determination of the constitutionality of Rule 809.32(1), Stats.

The court of appeals has no power to pass upon the questions posed by McCoy. Rule 809.32(1), Stats., is a rule prescribed by the supreme court for the regulation of the practice of the court of appeals. Such a procedural rule is binding upon this court until altered by the supreme court

K-2

or the legislature. Mosing v. Hagen, 33 Wis. 2d 636, 646-47, 148 N.W.2d 93, 99 (1967). Viewing McCoy's motion in this light, we conclude that any determination by this court of the constitutionality of Rule 809.32(1), Stats., would be advisory in nature. Courts of law do not render advisory opinions. Smith v. Pershing, 10 Wis. 2d 352, 357, 102 N.W.2d 765, 768 (1960). The constitutionality of sec. 809.32(1), Stats., must be determined by its supreme court authors and not by a court bound to obey what that court creates.

Upon the foregoing reasons,

IT IS ORDERED that McCoy's motion requesting that we determine the constitutionality of Rule 809.32(1), Stats., and to clarify the scope of representation is denied. Louis Butler, assistant public defender, is further directed to file a brief in compliance with Rule 809.32(1) within fifteen days of the date of this order.

Marilyn L. Graves
Clerk of Court of Appeals

K-3

STATE OF WISCONSIN

IN SUPREME COURT

Case No. _____

STATE OF WISCONSIN EX REL.
ELLIS T. McCOY,

Relator,

v.

From: Appeal No. 84-929-CR-NM
Trial No. K-3561

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Respondent.

PETITION FOR SUPERVISORY WRIT OF PROHIBITION AND DECLARATION OF RELATOR'S RIGHTS

The petition on behalf of Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, pursuant to Rule 809.71, Stats., hereby petitions this court for a supervisory writ of prohibition prohibiting the court of appeals from striking the brief previously filed and prohibiting the court of appeals from ordering counsel to provide reasons why the issues presented in that brief lack merit, in compliance with Rule 809.32(1), and petitions this

APPENDIX L

court, pursuant to Rule 809.70, Stats., to determine the constitutionality of Rule 809.32(1) and whether the rule violates relator's sixth amendment right to counsel, on the following grounds:

1. The petitioner, Louis B. Butler, Jr., represents the relator, in the case of State of Wisconsin v. Ellis T. McCoy, Case No. 84-929-CR-NM, now pending in the court of appeals, District I.

2. Relator moved for a determination of the constitutionality of Rule 809.32(1) before the court of appeals in a motion dated August 14, 1984.

3. The court of appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." See September 7, 1984 order, p. 2 (attached).

4. A "No Merit" brief was filed by this attorney on October 22, 1984, which was in compliance with Anders v. California, 386 U.S. 738 (1967) and the subsequent decision of Evitts v. Lucey, 469 U.S. ___, 83 L.Ed.2d 821, 828 (1985), but not in compliance with Rule 809.32(1).

5. The court of appeals, District I, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included.

The court also ordered that petitioner file a new brief within 15 days of the date of that order which is in compliance with the Rule.

6. The Wisconsin Supreme Court, in an order dated May 8, 1985 ruled that petitioner was not entitled to a supervisory writ and declaratory relief from that court for the reason "that he has an adequate remedy in the Court of Appeals by renewing his motion for a determination of the constitutionality of sec. (Rule) 809.32(1), Stats." See order in No. 85-0781-W, attached.

7. Petitioner renewed his "Motion to Determine Constitutionality of Rule 809.32(1) and to clarify Scope of Attorney's Representation on Appeal" in the Court of Appeals in a motion dated June 4, 1985 (attached).

8. The Court of Appeals denied petioner's motion in an order dated January 15, 1986 and amended January 16, 1986, stating that the "constitutionality of sec. 809.32(1), Stats., must be determined by its Supreme Court authors and not by a court bound to obey what that court creates." See order, attached.

9. The United States Supreme Court in Anders, supra, has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae, 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his

ability. Id. If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. Id. That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. Id. After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." Id. If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

10. The Wisconsin Supreme Court, consistent with Anders, has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. Cleghorn v. State, 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972). This Court has not as yet had an opportunity to review the current procedure since the creation of Rule 809.32(1).

11. The United States Supreme Court very recently has reaffirmed its prior holding in Anders, stating that the attorney ". . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached

evaluation of the appellant's claim." Evitts v. Lucey. 83 L. Ed. 2d at 828.

12. The United States Court of Appeals recently held that "(i)f the Anders procedure is to work, therefore, the lawyer filing the Anders brief must, to the extent possible, remain in his role as advocate; at this stage of proceeding it is not for the lawyer to act as an unbiased judge of the merit of particular grounds for appeal. He or she is required to set out any irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court, be arguably meritorious. This is done in order that those potential claims not be overlooked. The objective of these potential claims is for the court's determination, not the advocates." United States v. Blackwell, 767 F.2d 1486, 1487-88 (11th Cir. 1985).

13. At least one State Supreme Court has determined that it will no longer accept Anders motions, implying that frivolous briefs would be preferable. Huguley v. State, 253 Ga. 709, 324 S.E. 2d 729 (1985). But see Rule 809.25(3).

14. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders, the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

15. Petitioner and relator submit that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on relator's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be directly contrary to the mandates of Anders and Lucey that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, petitioner and relator submit that a discussion of why any issue lacks merit violates the sixth amendment.

16. Because petitioner believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is unconstitutional, petitioner cannot ethically take a position which would argue against his client or act as a friend of the court. This Court's rules require that while serving as an advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. SCR 20.34(1)(c) (1984). This Court has also determined that an advocate may urge any permissible construction of the law favorable to his or her client, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification or reversal of the law. SCR 20.34(2)(c) (1984).

17. An order by this Court prohibiting the court of appeals from striking the brief previously filed and from ordering counsel to provide reasons why the issues lack merit is necessary in order to protect relator's sixth amendment right to counsel. It would resolve the conflict that exists between the Wisconsin Rule and United State Supreme Court decisions.

18. An order by this Court as stated in para. 17 is necessary to prevent petitioner from violating this Court's ethical rules.

19. Petitioner would note that the No Merit procedure for petitions for review is substantially different than that for appeals, and that this Court does not require an attorney to provide reasons why a petition for review lacks merit. Compare 809.32(1) and (4).

20. Petitioner submits that the brief already filed in this action meets all of the requirements set forth by Anders and Lucey.

21. A declaration of relator's sixth amendment right to counsel and whether Rule 809.32(1) violated that right is necessary before any new brief is written to prevent petitioner from violating relator's sixth amendment right to counsel.

22. Petitioner and relator currently have no other adequate remedy at law, other than this petition, to protect relator's rights and prevent petitioner from violating his ethical duty.

WHEREFORE, petitioner respectfully requests that this Court strike that portion of rule 809.32(1) which requires that the attorney provide reasons why the issue lacks merit as unconstitutional, prohibit the court of appeals from striking the brief already filed, and prohibit the court of appeals from requiring petitioner to provide reasons why relator's appeal lacks merit in compliance with Rule 809.32(1).

Dated this 21st day of January, 1986.

Respectfully submitted,

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